89 No. 1343

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DESISTO COLLEGE, INC. and LOREN E. HORNER,

Petitioners,

vs.

THOMAS P. LINE, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I. QUESTION REPRESENTED FOR REVIEW

If counsel raises as a defense to Rule 11 sanctions the argument that he was seeking to extend, modify, or reverse existing law, can the Court consider counsel's lack of candor as to that defense?

II. INTERESTED PARTIES

Petitioners

DeSisto College, Inc.
Loren E. Horner

Respondents

Thomas Line
Paul Mazade
The Town of Howey-in-the-Hills
Arthur Pratt
Alan B. Mills
Rodney T. Griffith
John P. Purser, III
Carlin Washo

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IN DECIDING TO AFFIRM RULE 11 SANCTIONS, THE ELEVENTH CIRCUIT PROPERLY REJECTED COUNSEL'S ASSERTION THAT HE WAS ATTEMPTING, IN GOOD FAITH, TO CHANGE THE LAW.

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V. OPINIONS OF THE COURTS BELOW

The opinion of the court below, Desisto College, Inc. v. Line, 888 F 2d 755 (11th Cir.

1989), is annexed to the Petition for Writ of Certiorari as Appendix A. The opinion of the United States District Court for the Middle District of Florida, DeSisto College Inc. V. Line, No. 87-1-Civ-Oc-14 (M.D. Fla. March 31, 1988) is annexed to the Petition for the Writ of Certiorari as Appendix B.

VI. JURISDICTION

Petitioner is seeking certiorari review, pursuant to 28 U.S.C. § 1254 (1).

VII. RULE INVOLVED

Federal Rule of Civil Procedure 11 (The text of Rule 11 is contained in Section VII of the Petition for Writ of Certiorari).

VIII. STATEMENT OF THE CASE

In January of 1987, Desisto College filed a groundless civil rights suit against the Town of Howey-in-the-Hills and seven (7) town officials.

The complaint was amended four (4) times over the course of two (2) years. Under attack from the defendants and the Court the number of individual town official defendants dwindled to two (2). In the spring of 1988, Summary Judgement was granted in favor of all Defendants. The Eleventh Circuit Court of Appeals affirmed the Summary Judgement on November 15, 1989. DeSisto College, Inc. v. Line, 888 F.2d 766 (11th Cir. 1989). On June 19, 1989, the District Court awarded the Defendants costs and attorney's fees based on a finding that the lawsuit was groundless. That ruling has been appealed and is presently pending before the Eleventh Circuit, DeSisto College, Inc. v. Line, 89-3559 (11th Cir. 1989).

During the course of litigation, the court sanctioned the Plaintiff's attorney for, among other things, suing town officials who were

absolutely immune, failing to do adequate research and demonstrating a lack of candor with the Court as to the law on immunity.(J.A.-B at 73-76) [For purposes of brevity and simplicity the Respondents will adopt the Petitioner's Appendix and refer to it as Joint Appendix (J.A.)].

Plaintiffs' attorney appealed the award of sanctions to the United States Court of Appeals for the Eleveth Circuit, and the Eleventh Circuit affirmed the District Court. DeSisto College, Inc. v. Line 888 F.2d 755 (11th Cir. 1989). (J.A.-A at 1-57). In approving the sanction, the Eleventh Circuit Court found that Plaintiffs' counsel either failed to research the controlling law on immunity or intentionally attempted to mislead the Court as to the Status of the law. Counsel's post sanction argument that he had been attempting to change the law

was rejected (J.A.-A at 45-57). The court traced the various memoranda filed by the Plaintiff's counsel in oppostion to Defendants' repeated claims of immunity, in search of some indication that Plaintiffs' counsel had actually been trying to change the law. No evidence was found to support counsel's contention that he was attempting to change the law. The court concluded counsel had either negligently or intentionally ignored the controlling law on immunity. Accordingly, the sanctions were affirmed.

The Petition for Writ of Certiorari at bar is directed at the Eleventh Circuit Court's opinion affirming the Rule 11 sanctions.

IX. SUMMARY OF ARGUMENT

When considering Rule 11 sanctions against an attorney for filing an action which is barred by controlling law, it is appropriate for

the Court to test the validity of the Attorney's assertion that he was attempting, in good faith, to change the law.

X. ARGUMENT

> In deciding to affirm Rule 11 sanctions, the Eleventh Circuit properly rejected counsel's assertion that he was attempting, in good faith, to change the law.

Counsel has a distorted view of his sanction. He believes that the sanction was based merely on his failure to notify the Court that he was seeking to reverse, extend of modify existing law as to legislative immunity. This is simply not true. Counsel was santioned because the Court did not believe his post-sanction claim that he was attempting to change the law. The Court concluded that counsel either failed to research controlling law or intentionally

tried to mislead the Court as to the law. Based on this conclusion the sanction was affirmed. (J.A.-A at 45-57). Counsel continues to paint himself as a legal innovator who zealously sought to change the law, who was victimized by a mere technicality, and whose only fault was failing to label the suit against town officials as an effort to change the law. The District Court and the Eleventh Circuit Court of Appeals rejected that claim as a sham. This court should do likewise.

The entire focus of the Petition for Writ of Certiorari is the Eleventh Circuit Court's reference to the lack of notice by Counsel of his alleged efforts to change the law. Petitioners interpret the Eleventh Circuit's opinion as establishing a labeling requirement. A reading of the relevant portion of the Court's opinion demonstrates that no such labeling

requirement was imposed. (J.A.-A at 45-57). The issue of notice arose only as part of the Court's search into the pleadings and memoranda done for the purpose of ascertaining the truthfulness of counsel's post-sanction claim to have been trying to change the law. The court traces the different arguments made by the Plaintiffs' attorney at various stages in response to the Defendant town officials repeated cry of immunity. (J.A.-A at 48-53).

The court found no evidence that counsel was seeking to change the law. Certainly, if counsel were attempting to change the existing law it would be apparent in his memoranda filed on the immunity issue. Would there not be citations to the controlling law and argument attacking its rational? No such argument is present in counsel's pre-sanction memoranda. The first mention of any effort to change the law

came in the motion for reconsideration as to sanctions. (J.A.-A at 52). Based on this finding, the Court rejected counsel's "change the law" defense and affirmed the sanction.

The Court did not require the labeling of all efforts to change the law as the Petitioner argues. Simply, the Court recognizes that good faith imposes a duty on counsel to acknowledge, at some point, binding precedent disfavorable to counsel's position. (J.A.-A at 54). Any attorney who honestly attempts in "good faith" to change law will effortlessly and inadvertently meet this requirement. On the other hand, an attorney who violates Rule 11 by failing to conduct reasonable research or by intentionally misleading the Court, will not likely mention the binding precedent, and thereby fail to meet requirements imposed by the Eleventh Circuit. Such a rule does not impose an unreasonable

onerous labeling requirement. Instead, it creates a practical method for weeding out abuses of the "change the law" defense.

Based on the circumstances presented to the District Court and the Eleventh Circuit Court of Appeals, it was concluded that counsel either failed to research the law before suing the immune Town Officials, or he intentionally attempted to mislead the Court as to the applicable law in order to avoid dismissal of the claims barred by immunity. The Court properly tested the validity of counsel's eleventh hour "change the law" defense and rejected it as being ingenuine.

XI. CONCLUSION

For the reason described above the Petition for Writ of Certiorari should be denied, or in the alternative, the opinions of the District Court and the Eleventh Circuit Court of

Appeals should be affirmed. A ruling to the contrary would diminish the power of Rule 11 and the lower courts' ability to control abuses by attorneys who practice before them.

Respectfully submitted,

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